

CUSTOMS BULLETIN AND DECISIONS

***Weekly Compilation of
Decisions, Rulings, Regulations, Notices, and Abstracts
Concerning Customs and Related Matters of the
Bureau of Customs and Border Protection
U.S. Court of Appeals for the Federal Circuit
and
U.S. Court of International Trade***

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This issue contains:

Bureau of Customs and Border Protection

General Notices

U.S. Court of International Trade

Slip Op. 03-133 and 03-148

**DEPARTMENT OF HOMELAND SECURITY
BUREAU OF CUSTOMS AND BORDER PROTECTION**

NOTICE

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Bureau of Customs and Border Protection

General Notices

Notice of a Decision of the United States Court of Appeals for the Federal Circuit Reversing the Decision of the Court of International Trade to Sustain a Domestic Party Petition Concerning the Classification of Textile Costumes

AGENCY: Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of the decision of the United States Court of Appeals for the Federal Circuit in the matter of Rubie's Costume Company v. United States, Appeal No. 02-1373 (decided August 1, 2003), reversing the decision of the Court of International Trade which sustained a domestic party petition seeking classification of textile costumes as wearing apparel of Chapters 61 or 62 of the Harmonized Tariff Schedule of the United States (HTSUS).

SUMMARY: On August 1, 2003, the United States Court of Appeals for the Federal Circuit (CAFC) issued its decision in the matter of Rubie's Costume Company v. United States, Appeal No. 02-1373, reversing the Court of International Trade (CIT) in Rubie's Costume Company v. United States, 196 F. Supp 2d 1320 (Ct. Int'l Trade 2002). The CIT had ruled that the textile costumes before it were "fancy dress" of textile and therefore classifiable as wearing apparel of Chapter 61, HTSUS. In reversing the CIT, the CAFC upheld the earlier classification determination of Customs and Border Protection (CBP), which classified textile costumes of a flimsy nature and construction, lacking in durability, and generally recognized as not being normal articles of apparel, as "festive articles" of Chapter 95, HTSUS. This document provides notice of the CAFC decision and informs the public that imported textile costumes, which CBP determines to be of a flimsy nature and construction, lacking in durability and generally recognized as not being normal articles of wearing apparel, are to be classified and assessed duty in accordance with the CAFC decision as "festive articles" of Chapter 95, HTSUS.

EFFECTIVE DATE: CBP began liquidating suspended entries and classifying incoming entries of merchandise in accord with the deci-

sion in the matter of Rubie's Costume Company v. United States as of October 31, 2003.

FOR FURTHER INFORMATION CONTACT: For questions regarding operational issues, contact Janet Labuda, Textile Enforcement and Operations Division, Office of Field Operations, 202-927-0414; for legal questions, contact Rebecca Hollaway, Textiles Branch, Office of Regulations and Rulings, 202-572-8814.

SUPPLEMENTARY INFORMATION:

Background

On February 19, 2002, the Court of International Trade (CIT) issued a decision in Rubie's Costume Company v. United States, 196 F. Supp 2d 1320 (Ct. Int'l Trade 2002), in which the court ruled that certain imported textile costumes before it were classifiable as wearing apparel of Chapter 61 of the Harmonized Tariff Schedule of the United States (HTSUS). The decision sustained the position of a domestic interested party under the provisions of section 516, Tariff Act of 1930, as amended (19 U.S.C. 1516). Pursuant to 19 U.S.C. 1516(f) and 19 C.F.R. 175.31, CBP published notice of the court's decision in the Federal Register, 67 FR 9504, on March 1, 2002, and notified the public that, effective the day after publication of the notice in the Federal Register, CBP would classify merchandise of the character of the merchandise at issue, which was entered for consumption or withdrawn from warehouse for consumption, in accordance with the court's decision. See "Notice of Decision of the United States Court of International Trade Sustaining Domestic Interested Party Petition Concerning Classification of Textile Costumes," 67 FR 9504 (March 1, 2002) for detailed background of the domestic interested party petition.

On August 1, 2003, the Court of Appeals for the Federal Circuit (CAFC) reversed the decision of the CIT. The court held that the CBP classification ruling on the textile costumes at issue is persuasive and must be granted deference under Skidmore v. Swift & Co., 323 U.S. 134 (1944). The court concluded that "textile costumes of a flimsy nature and construction, lacking in durability, and generally recognized as not being normal articles of apparel, are classifiable as 'festive articles.'" The court reversed the decision of the CIT holding the merchandise at issue to be classifiable as "wearing apparel." (The court's decision may be viewed on the court's web site at www.fedcir.gov).

Under 19 CFR 175.31, CBP is not required to publish notice to the public of a decision of the CAFC reversing a cause of action before the CIT under the provisions of section 516, Tariff Act of 1930, as amended (19 CFR 1516). However, due to the length of the controversy of the classification of textile costumes and the significant interest in this issue, CBP believes notice to the public of the reversal

of this decision of the CIT is warranted. CBP will take no action on entries subject to this case until the appeal period has run. See 19 CFR 176.31(b).

Dated: November 7, 2003

MICHAEL T. SCHMITZ,
Assistant Commissioner,
Office of Regulations and Rulings.

DEPARTMENT OF HOMELAND SECURITY,
OFFICE OF THE COMMISSIONER OF CUSTOMS.

Washington, DC, November 12, 2003,

The following documents of the Bureau of Customs and Border Protection ("CBP"), Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and CBP field offices to merit publication in the CUSTOMS BULLETIN.

Sandra L. Bell for MICHAEL T. SCHMITZ,
*Assistant Commissioner,
Office of Regulations and Rulings.*

19 C.F.R. PART 177

**REVOCATION OF RULING LETTER AND REVOCATION OF
TREATMENT RELATING TO TARIFF CLASSIFICATION OF AN
ANALOG WRIST WATCH**

AGENCY: Bureau of Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of revocation of ruling letter and revocation of treatment relating to tariff classification of an analog wrist watch.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling letter relating to the tariff classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of an analog wrist watch, and revoking any treatment previously accorded by Customs to substantially identical transactions. No comments were received in response to this notice.

EFFECTIVE DATE: This revocation is effective for merchandise entered or withdrawn from warehouse for consumption on or after January 25, 2004.

FOR FURTHER INFORMATION CONTACT: Keith Rudich, Commercial Rulings Division, (202) 572-8782.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "informed compliance" and "shared responsibility." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. § 1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, a notice was published on July 9, 2003, in the *Customs Bulletin*, Vol. 37, No. 28, proposing to revoke NY 188952 dated December 16, 2002, pertaining to the tariff classification of an analog wrist watch. No comments were received in response to this notice.

As stated in the proposed notice, this revocation will cover any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should have advised Customs during the comment period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should have advised Customs during

this notice period. An importer's failure to have advised Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or their agents for importations of merchandise subsequent to the effective date of this final notice.

In NY I88952, dated December 16, 2002, Customs found that an analog wrist watch was classified in subheading 9102.19.40, HTSUS, as: "Wrist watches, pocket watches and other watches, including stop watches, other than those of heading 9101: Wrist watches, electrically operated, whether or not incorporating a stop watch facility: Other: Having no jewels or only one jewel in the movement: Other."

Customs has reviewed the matter and determined that the correct classification of the analog wrist watch is in subheading 9102.11.45, HTSUS, which provides for: "Wrist watches, pocket watches and other watches, including stop watches, other than those of heading 9101: Wrist watches, electrically operated, whether or not incorporating a stop watch facility: With mechanical display only: Having no jewels or only one jewel in the movement: Other: Other."

Pursuant to 19 U.S.C. 1625(c)(1), Customs is revoking NY I88952, as well as any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in Headquarters Ruling Letter (HQ) 966206, as set forth in the Attachment to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the *Customs Bulletin*.

Dated: September 11, 2003

John Elkins for MYLES B. HARMON,
Director,
Commercial Rulings Division.

Attachment

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,

HQ 966206

September 11, 2003

CLA-2 RR:CR:GC 966206 KBR

CATEGORY: Classification

TARIFF NO.: 9102.11.45

MS. CHRISTY MILLER
CUSTOMS SPECIALIST
NIKE, INC.
One Bowerman Drive
Beaverton, OR 97005-6453

RE: NY I88952 Revoked; Analog Wrist Watch

DEAR MS. MILLER:

This is in reference to New York Ruling Letter (NY) I88952, issued to you on December 16, 2002, concerning Protest 3801-98-102222. This ruling concerned the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of the Presto Cee analog wrist watch. We have reviewed NY I88952 and determined that the classification provided for the analog wrist watch is incorrect. This ruling sets forth the correct classification.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), a notice was published on July 9, 2003, Vol. 37, No. 28 of the *Customs Bulletin*, proposing to revoke NY I88952. No comments were received in response to this notice.

FACTS:

NY I88952 concerned Style WT0009, the Presto Cee Analog, a women's battery operated quartz analog wrist watch in a plastic case. There are no jewels in the movement. The watch has a plastic watch band with ventilated wrist grips and is water resistant to 30 meters. The analog wrist watch features a white dial with silver-tone hour, minute and second hands.

In NY I88952, it was determined that the analog wrist watch was classified in subheading 9102.19.40, HTSUS, as: "Wrist watches, pocket watches and other watches, including stop watches, other than those of heading 9101: Wrist watches, electrically operated, whether or not incorporating a stop watch facility: Other: Having no jewels or only one jewel in the movement: Other." We have reviewed that ruling and determined that the classification is incorrect. This ruling sets forth the correct classification.

ISSUE:

Whether the analog wrist watch is classified as "with mechanical display only" under subheading 9102.11, HTSUS.

LAW AND ANALYSIS:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). Under GRI 1, merchandise is classifiable according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified on the basis of GRI 1,

and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

The HTSUS provisions under consideration are as follows:

9102 Wrist watches, pocket watches and other watches, including stop watches, other than those of heading 9101:

Wrist watches, electrically operated, whether or not incorporating a stop watch facility:

9102.11 With mechanical display only:

Having no jewels or only one jewel in the movement:

Other:

9102.11.45 Other

9102.19 Other:

Having no jewels or only one jewel in the movement:

9102.19.40 Other

The article at issue is a battery powered, quartz analog wrist watch. To determine the time of day, the user looks at a traditional watch face—a dial with hands. This is in contrast to a digital watch where the time of day is displayed numerically, typically with a LCD or LED display.

The article's dial and hands display is called a "mechanical display." The HTSUS specifically provides for a watch which has only a mechanical display in subheading 9102.11, HTSUS. See HQ 086562 (June 12, 1990), NY H86759 (January 25, 2002), and NY H80178 (May 9, 2001). The HTSUS treats a wrist watch with a mechanical display differently than a wrist watch with a digital display, the latter being classified in subheading 9102.19, HTSUS. See NY C88974 (July 7, 1998) and NY C81810 (December 17, 1997).

Therefore, since the instant Presto Cee analog wrist watch has a dial and hands display, it is classified as a wrist watch with a mechanical display only in subheading 9102.11.45, HTSUS.

HOLDING:

The Presto Cee analog wrist watch is classified under subheading 9102.11.45, HTSUS, as: "Wrist watches, pocket watches and other watches, including stop watches, other than those of heading 9101: Wrist watches, electrically operated, whether or not incorporating a stop watch facility: With mechanical display only: Having no jewels or only one jewel in the movement: Other: Other."

EFFECT ON OTHER RULINGS:

NY 188952 dated December 16, 2002, is REVOKED. In accordance with 19 U.S.C. § 1625(c), this ruling will become effective sixty (60) days after publication in the *Customs Bulletin*.

John Elkins for MYLES B. HARMON,
Director,
Commercial Rulings Division.

United States Court of International Trade

One Federal Plaza
New York, NY 10278

Chief Judge

Jane A. Restani

Judges

Gregory W. Carman
Thomas J. Aquilino, Jr.
Donald C. Pogue
Evan J. Wallach

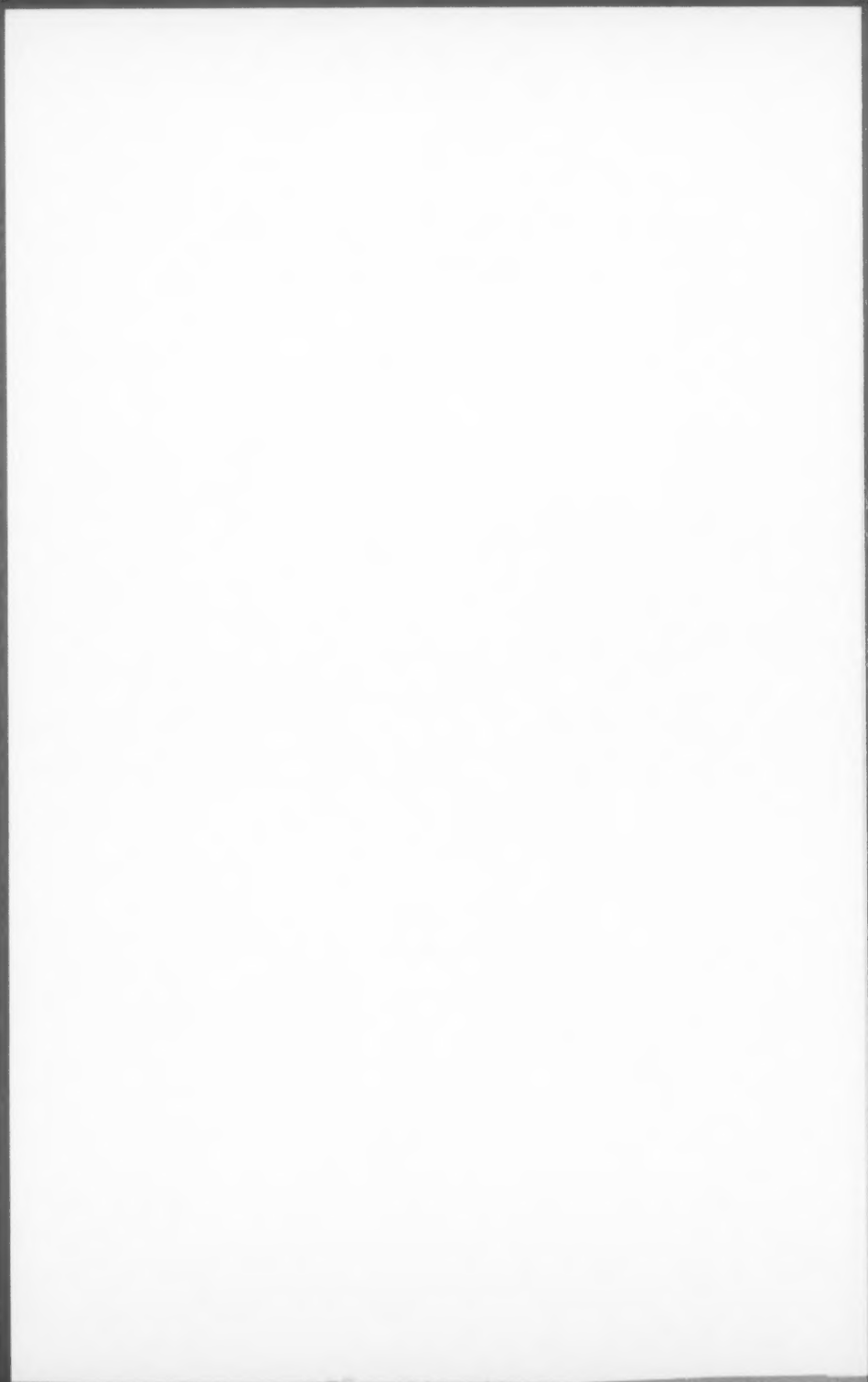
Judith M. Barzilay
Delissa A. Ridgway
Richard K. Eaton
Timothy C. Stanceu

Senior Judges

Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Clerk

Leo M. Gordon



Decisions of the United States Court of International Trade

Slip Op. 03-133

CHINA NATIONAL MACHINERY IMPORT & EXPORT CORPORATION,
PLAINTIFF, v. UNITED STATES, DEFENDANT, AND THE TIMKEN COM-
PANY, DEFENDANT-INTERVENOR.

Before: Judge Judith M. Barzilay

Public Version

Court No. 01-01114

[United States Department of Commerce antidumping duty remand determination sustained.]

Decided: October 15, 2003

Crowell & Moring L.L.P., (Jeffrey L. Snyder), Alexander H. Schaefer, for Plaintiff.
Peter D. Keisler, Assistant Attorney General, United States Department of Justice,
David M. Cohen, Director, Commercial Litigation Branch, Civil Division, *Patricia M.*
McCarthy, Assistant Director, (*Ada E. Bosque*), Trial Attorney; *Amanda L. Blaurock*,
Office of the Chief Counsel for Import Administration, United States Department of
Commerce, of Counsel, for Defendant.

Stewart and Stewart, Terence P. Stewart, (*Wesley K. Caine*), for Defendant-
Intervenor.

OPINION

BARZILAY, Judge: This case is before the court following remand to the United States Department of Commerce ("Commerce" or "Defendant" or "Department"). In *China National Machinery Import & Export Corp. v. United States*, 27 CIT ___, 264 F. Supp. 2d 1229 (2003) ("CMC I"), familiarity with which is presumed, the court sustained in part and remanded in part the Department's determination with respect to Plaintiff China National Machinery Import and Export Corporation ("CMC" or "Plaintiff") in *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China; Final Results of 1999-2000 Administrative Review, Partial Rescission of Review, and Determination Not to Revoke Order in Part*, 66 Fed. Reg. 57,420 (Nov. 15, 2001) ("Final Results").

Plaintiff CMC is an exporter of the subject merchandise, tapered roller bearings ("TRBs"), from the People's Republic of China, a non-market economy ("NME") country. The dispute involves the prices of a steel input, hot-rolled alloy steel bar, which CMC purchased from its supplier in [[]], a market economy country, and used in the production of TRBs sold to the United States.¹ In *CMC I*, the court held that, if Commerce had "reason to believe or suspect" that the supplier's prices were subsidized, Commerce could employ surrogate values instead of actual prices in normal value ("NV") calculations of dumping margins where it determines that such prices are best information available under the statute. See *CMC I* at 1238; see also 19 U.S.C. § 1677b(c)(1) (2000) (providing the use of "the best available information" concerning the values for factors of production of an exporter in an NME country); H.R. Conf. Rep. No. 100-576, at 590 (1988), reprinted in 1988 U.S.C.A.N. 1547, 1623 ("House Report") (instructing Commerce to avoid using any price "which it has reason to believe or suspect may be dumped or subsidized") (emphasis supplied). In *CMC I*, the court stated that it will "affirm Commerce's actions if, given the entire record as a whole, there is substantial, specific, and objective evidence which could reasonably be interpreted to support a suspicion that the prices CMC paid to its market economy supplier were distorted." *CMC I* at 1240. Applying the standard to the facts of the case, the court found that Commerce did not sufficiently explain and highlight evidence in support of its determinations in the *Final Results*. *Id.* Consequently, the court remanded the case to Commerce to review and augment the administrative record and explain its determinations further. See *id.* at 1243.

Pursuant to the court's order, Commerce issued its *Final Results of Redetermination Pursuant to Remand* (May 13, 2003) ("*Remand Results*"). Plaintiff CMC and Defendant-Intervenor The Timken Company ("Timken") timely responded to the *Remand Results*. In this matter the court has jurisdiction pursuant to 28 U.S.C. § 1581(c). The court must uphold Commerce's determination if it is supported by substantial evidence and is otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). After reviewing the parties' submissions, the administrative record, and all other papers and proceedings, the court is satisfied that the *Remand Results* are in adequate compliance with the court's order. Accordingly, the court sustains the *Remand Results*.

¹The identity of CMC's supplier [[]] and the name of the exporting country where the supplier is located are confidential, and therefore set in double brackets in the confidential version of this opinion and deleted from the public version.

I.

Commerce has a duty to calculate dumping margins as accurately as possible and should typically refrain from using surrogate values (which in themselves are imperfect substitutes) in dumping margin calculations where market-determined values are available. See *Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994). Consistent with this mandate, the applicable regulation advises Commerce to employ actual market values, where available, for NV calculations of an NME exporter, under normal circumstances. See 19 C.F.R. § 351.408(c)(1) (2000). On the other hand, as this court pointed out in *CMC I*, Commerce cannot be compelled to use actual prices where it has reason to believe or suspect that such prices are subsidized. See *CMC I* at 1238. The court must look to the facts of record in the case to determine whether Commerce has sufficient reasons to suspect that actual prices are distorted such that the substitution of actual prices with surrogate values is warranted.

The court notes that, until the twelfth administrative review of this antidumping duty order, Commerce employed actual prices paid in its dumping margin calculations. During the twelfth review, Commerce determined that such prices were likely to be distorted by subsidies and should therefore be abandoned in favor of surrogate values. Commerce based its determination on a generally available and countervailable subsidy program in the exporting country, uncovered in countervailing duty investigations from the 1999–2000 period involving subject merchandise other than hot-rolled alloy steel bar and companies other than CMC's supplier. After remand, Commerce supplemented the record with an Office of Policy Memorandum (dated February 2002), which memorializes Commerce's decision to abandon steel-related factor input prices from the exporting country, as well as two other countries. In this memorandum, Commerce explains that these countries maintain "broadly available, non-industry specific export subsidies," and adds that, where Commerce already conducted a countervailing duty investigation, "the facts of the underlying investigation must be examined and taken into account." In the *Remand Results*, Commerce maintains that the exporting country provides "industry specific subsidies and non-industry specific export subsidies." *Remand Results* at 8.

In *CMC I*, this court articulated three specific grounds in finding Commerce's offered reasons insufficient. First, neither the subject merchandise in question, nor CMC's supplier was ever specifically investigated in a countervailing duty investigation. Accordingly, the level of distortion, if any, in the price of hot-rolled alloy steel bar by reason of subsidies was never determined. Second, in the *Final Results* Commerce relied on an internal confidential memorandum, *Market Economy Steel Memo* (Nov. 7, 2001), as justification for its change of methodology. The court was concerned that numbers tabulated (without explanation in that memorandum) as the level of sub-

sidies for steel products from the exporting country appeared to be very low. In other words, it seemed to the court that, even in affirmative countervailing duty determinations for other steel products, the range of subsidy values barely exceeded *de minimis* amounts at the upper limit. Specifically, [[

]]. Third, one of the countervailing duty investigations from the 1999–2000 period pertaining to the exporting country yielded a negative result. See [[

]]. That is, Commerce found with respect to the merchandise subject to that investigation that the countervailable subsidy rate was *de minimis*. In sum, the court was reluctant to allow Commerce to choose imprecise surrogate values over actual prices without further justification where evidence of distortion in prices CMC paid to its market economy supplier fell short of substantial, specific evidence.

In the *Remand Results*, Commerce emphasizes that CMC's supplier is a "member of a subsidized industry" and "could have benefited" from subsidies generally available in the exporting country for exporters of steel products, regardless of the type of product or company, and further emphasizes that such subsidies were specifically found to be utilized by several steel producers.² *Remand Results* at 9, 12–13. The existence of these subsidies was confirmed in the Department's 1999–2000 countervailing duty determinations. Commerce offers that there is no evidence in the record that CMC's supplier "was not eligible to participate" in subsidy programs. *Id.* at 14. Commerce points to its long standing agency policy to disregard suspected distorted prices. *Id.* at 9–10. Commerce and Defendant-Intervenor Timken further point out that the company subject to the negative countervailing duty determination constitutes an "anomaly" in that it is the largest steel producer in the exporting country and is government-controlled. *Id.* at 14–15 n.16; *Def.-Intervenor's Rebuttal to Pl.'s Comments on Commerce Dep't's Remand Redetermination* ("Timken Br.") at 4; see also *CMC I* at 1240 (dictating Commerce to explain why this producer's case is an anomaly). That company is also known to participate in the subsidy programs as a provider, such as engaging in [[]]. Commerce further states that companies that were recipients of the subsidy programs and that were subject to the Department's positive countervailing duty determinations are more representative of CMC's supplier. *Remand Results* at 9.

Commerce explains that it is reasonable to believe that "a market company operating under normal [i.e., competitive] market principles would take advantage of . . . benefits" that are made available to it. *Id.* at 9, 13. Commerce stresses that export subsidy programs

²In particular, Commerce found that [[]]
]] *Remand Results* at 12.

in the steel industry of the exporting country were "contingent on a company's export performance" and were not otherwise restricted. *Id.* at 13. Commerce argues that "[u]nless a particular market supplier has been found to have *de minimis* subsidy benefits, . . . the specific level of subsidization is not a relevant consideration in [its] analysis of whether there is reason to believe or suspect that prices may be subsidized." *Id.* at 15.

With respect to level of subsidization, Defendant-Intervenor Timken adds that "[n]othing in the statute or regulation, or even the legislative history, speaks in terms of subsidy *sizes* so far as input values are concerned." *Timken Br.* at 5-6 (emphasis in the original). Timken therefore avers that Commerce's interpretation of which values to use in the calculation of NV in an NME country context is "subject only to reasonableness review."³ *Id.* at 6. Timken contends that the agency acted reasonably because it "looked to legislative history to construe and administer the statute and regulation." *Id.* As the *House Report* speaks of discarding "any" distorted price, Timken's argument implies that such mandate includes actual prices paid on market.⁴

Plaintiff CMC responds that Commerce's explanations of the *Remand Results* merely consist of "a re-argument of the case based on the same record facts that this Court already found insufficient to justify the initial results." *Pl.'s Comments on the Dep't of Commerce's Proposed Final Results of Redetermination Pursuant to Remand* at 2. CMC argues that Commerce has failed to address the negative countervailing duty finding that undermines its conclusion. *Id.* at 3. CMC contends that Commerce failed to specifically link CMC's supplier to any subsidy program. *Id.* at 5. CMC further points out that the *Remand Results* "also fail to address the *de minimis* issues that the Court raised." *Id.* at 6. CMC maintains that "Commerce's analysis leads inevitably to a perverse result." *Id.* at 7. In particular, actual prices charged by an input supplier with a *de minimis* countervailing duty finding would be acceptable while such prices of a supplier with no countervailing duty finding (whether positive or negative) may be disregarded based on findings relating to other suppliers.

The "reason to believe or suspect" standard articulated in the *House Report* by which Commerce's actions must be evaluated establishes a lower threshold than what is required to support a firm conclusion. The clarification of the standard in *CMC I*, as well as its jux-

³ As noted, a preference for market values appears in the Department's regulation. See 19 C.F.R. § 351.408(c)(1).

⁴ Timken's arguments to this court additionally contain a criticism of the court's formulation of the "reason to believe or suspect" standard. However, this court believes that the insistence on specific and objective evidence (even for a "belief" or "suspicion") is an integral part of the substantial evidence analysis.

taposition with the substantial evidence standard in that opinion, does not modify the standard in terms of its demands on the agency. *Cf. Kerr-McGee Chem. Corp. v. United States*, 21 CIT 1353, 985 F. Supp. 1166 (1997) (employing the "reason to believe or suspect" standard). The court in *CMC I* maintained that the agency's actions are entitled to deference as long as the agency points to substantial, specific, and objective evidence in support of its *suspicion* that the prices are distorted. *CMC I* at 1240 (emphasis added). As Commerce notes in the *Remand Results*, a "reason to believe or suspect requires less evidence than an actual finding of subsidies in fact." *Remand Results* at 6. Moreover, the *House Report* specifically points out that a "formal investigation" is not necessary. *House Report* at 590. The statute further allows Commerce to act given "best available information." 19 U.S.C. § 1677b(c)(1). Therefore, it is clear that Congress provided the agency with ample discretion to disregard suspected distorted prices.

The court finds that the Department's *Remand Results* sufficiently comply with the court's remand order, even though the court acknowledges CMC's argument that Commerce's actions may indeed produce less than ideal results, and the question of whether the suspicion of subsidization at any level should warrant the use of imperfect surrogate values. The *Remand Results* are sufficient in that Commerce further explains the exporting country's subsidy programs, and why one negative countervailing duty determination is immaterial to CMC's case. It also explains why it could not determine CMC's particular subsidy level short of a formal investigation.

Moreover, even though accurate calculation of dumping margins is an overarching goal of the antidumping duty statute, a recent decision from the United States Court of Appeals for the Federal Circuit emphasized that such a goal must necessarily be "within the confines of the statutes, not in derogation of a statutory provision." *Viraj Group, Ltd. v. United States*, 343 F.3d 1371, 1377 (Fed. Cir. 2003). Analogously here, Commerce's actions are within the confines of the statute, the regulation, and the legislative history despite the fact that such actions may produce a less than precisely accurate result. As Timken points out, the statute does not specify a particular level of subsidization at which actual market prices may be discarded. In fact, the statute does not mention market prices. It is only the Department's regulation that mentions and states a preference for market prices.⁵

Under the applicable standard of review, this court may not substitute its judgment for that of the agency as long as the agency's

⁵The court notes that an agency is bound by its own regulations. See *United States v. Nixon*, 418 U.S. 683, 694-96 (1974). However, here the Department's actions do not contravene its regulation. The regulation merely dictates that actual prices will be used under normal circumstances. See 19 C.F.R. § 351.408(c)(1).

construction of the statute is reasonable. See *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994) (noting that "a court must defer to an agency's reasonable interpretation of a statute even if the court might have preferred another") (citation omitted). Furthermore, substantial evidence "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 620 (1966) (citation omitted). Here, Commerce's actions are reasonable because a company like CMC's supplier may have benefitted from a generally available subsidy program given the competitive nature of the industry and by virtue of having engaged in foreign trade. Commerce specifically found that such a program existed and companies like CMC's supplier did indeed utilize the program. Given the level of deference owed to the agency and the low threshold established by the "reason to believe or suspect standard," the court accordingly affirms the *Remand Results*.⁶

II.

For all the foregoing reasons, the Department's determination in *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China; Final Results of 1999-2000 Administrative Review, Partial Rescission of Review, and Determination Not to Revoke Order in Part*, 66 Fed. Reg. 57,420 (Nov. 15, 2001), as modified by *Final Results of Redetermination Pursuant to Remand* (May 13, 2003), is sustained. A separate judgment will be entered accordingly.

⁶Plaintiff raised two additional issues in its original papers to the court. In particular, CMC argued that Indonesia was a better surrogate than India and further challenged Commerce's adding of ocean freight and marine insurance costs to price data. In *CMC I*, the court found that these issues were inchoately argued by Plaintiff, and further noted that Commerce's actions, without a forceful argument by Plaintiff to the contrary, were a reasonable exercise of the agency's discretion. *CMC I* at 1238 n.14.

Slip Op. 03-148

KYOCERA INDUSTRIAL CERAMICS CORPORATION, PLAINTIFF, *v.* UNITED STATES, DEFENDANT.

Court No. 02-00705

[Defendant's motion for summary judgment denied.]

Dated: November 7, 2003

DeKieffer & Horgan (J. Kevin Horgan and A. David Lafer) for the plaintiff.

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Acting Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Jack S. Rockefeller*); and Office of Assistant Chief Counsel, International Trade Litigation, U.S. Bureau of Customs and Border Protection (*Michael W. Heydrich*), of counsel, for the defendant.

Memorandum & Order

AQUILINO, Judge: The amended complaint filed herein on behalf of the above-captioned plaintiff, the corporate name of which its counsel have compressed to "KICC", contests denial by the U.S. Customs Service¹ of classification of certain ceramic substrates for integrated circuits ("IC substrates") under subheading 8542.90.00 of the Harmonized Tariff Schedule of the United States ("HTSUS") ("Electronic integrated circuits and microassemblies; parts thereof: . . . Parts"). The defendant interposed an answer thereto, and its counsel have now filed a Motion to Dismiss Plaintiff's Action for Lack of Subject Matter Jurisdiction "[p]ursuant to Rule 12(b)(1) of the Rules of the United States Court of International Trade".

I

Of course, those Rules do not contemplate such a motion subsequent to joinder of issue. Rather, USCIT Rule 12(c) provides:

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be

¹Now known as the Bureau of Customs and Border Protection per the Homeland Security Act of 2002, § 1502, Pub. L. No. 107-296, 116 Stat. 2135, 2308-09 (Nov. 25, 2002), and the Reorganization Plan Modification for the Department of Homeland Security, H.R. Doc. 108-32, p. 4 (Feb. 4, 2003).

given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.²

Here, defendant's motion for such judgment has engendered submissions outside the pleadings on both sides. Appended to plaintiff's amended complaint is a schedule "A" of 21 enumerated protests to Customs, encompassing many more, individual, listed entries. The parties have produced copies of KICC's lengthy, written entreaty to the Service Port Director in San Francisco in support of its protests to the effect that the IC substrates are classifiable under HTSUS subheading 8542.90.00—or, in the alternative, under subheading 6909.11.40.³ In HQ 964811 (May 1, 2002), the Service issued the following holding (as to KICC protest 280900–100735):

The protest should be GRANTED as to the alternative classification claimed. The blank ceramic substrates referred to as IC substrates are classified in subheading 6909.11.40, which provides for, "Ceramic wares for laboratory chemical, or other

²Subsection (h) of that Rule 56 mandates annexation to such a motion of

a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried.

This the defendant has not done. Rather, it has filed a motion to stay discovery pending resolution of its motion for judgment of dismissal. According to this subsidiary motion, discovery has commenced in accordance with the court's amended scheduling order of August 27, 2003, but government counsel now take the position that the filing of the "dispositive motion to dismiss . . . [makes] discovery by either party . . . not required." Declaration of Jack S. Rockafellow, para. 10.

The plaintiff opposes this motion for a stay on both procedural and substantive grounds, including that defendant's responses to certain interrogatories may be relevant to the issue of subject-matter jurisdiction. See, e.g., Plaintiff's Opposition to Defendant's Motion to Stay Discovery, fourth, unnumbered page.

Both sides have also filed a consent motion for oral argument on the issue of authority to order continuation of discovery in an action not subject to the court's statutory jurisdiction.

Suffice it to state, as discussed hereinabove and after, that the court's conclusion that it does indeed have such jurisdiction over this action obviates the need to grant either oral argument or a stay of discovery in connection therewith other than to extend the deadlines for discovery set forth in the August scheduling order by the number of days defendant's motion for judgment may have interrupted that pretrial process, and they hereby are.

³See, e.g., Memorandum in Support of Defendant's Motion to Stay Discovery, Attachment B. KICC's entries were of both IC substrates and those

produced from alumina combined with titanium carbide that is harder than 9 on the Mohs scale and is used as a substrate for a magnetic head slider in the manufacture of disc drives for automatic data processing machines ("MH substrates").

Id., first numbered page. Customs had classified the ICs under HTSUS subheading 6914.10.80 and the MHs under subheading 6914.90.80.

While KICC protested both classifications, the court does not read plaintiff's amended complaint as contesting now the classification of the MH substrates.

uses . . . : ceramic wares for laboratory, chemical or other uses: of porcelain or china: other." . . .⁴

Whereupon the first affirmative defense pleaded by the government is that this court

lacks jurisdiction over . . . this action[] because the alternative relief sought in the protests which are the subject of this action was granted.

Defendant's Answer to Complaint, p. 3. And it moves for judgment on this ground.

A

The plaintiff pleads jurisdiction pursuant to 28 U.S.C. § 1581(a), which states:

The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

This statute further provides:

A civil action contesting the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930 may be commenced in the Court of International Trade by the person who filed the protest pursuant to section 514 of such Act

28 U.S.C. § 2631(a). On its face, this enactment reflects the intent of Congress that a partial denial of a protest by Customs be subject to judicial review. Nonetheless, the defendant denies that this action can sustain such review. It refers to *Sanyo Electric, Inc. v. United States*, 81 Cust.Ct. 114, 115, C.D. 4775 (1978), which held that

the proper measure of the extent to which a protest has been denied or granted is the extent to which the protest has resulted in a change of the protested decision. When the decision is entirely changed to conform to a decision sought by the protest, that protest has been completely granted. The only logically consistent way to determine whether a protest has been denied in part is to see whether any part of the protested decision remains in effect.

In that matter, the importer had protested Customs classification of its goods under one item (685.50) of the Tariff Schedules of the United States as opposed to preceding item 685.30 in the same tariff

⁴Memorandum in Support of Defendant's Motion to Stay Discovery, Attachment C, p. 7 (capitalization in original).

schedule 6 and part thereof or, in the alternative, under an item (678.50) in the preceding part (4) of that same schedule. The Service granted the protest and reliquidated the merchandise under the first-claimed item 685.30. The importer brought suit, which was dismissed upon the court's conclusion that the

proper procedure would be for the party to advance its preferred alternative claim in a new protest against the revised decision following reliquidation of the entry.

81 Cust.Ct. at 115.

Assuming, as the defendant urges, that KICC could have so proceeded with this matter, the question remains whether it was required to do so. See, e.g., *Bd. of Trustees of Leland Stanford Junior Univ. v. United States*, 20 CIT 1422, 1424, 948 F.Supp. 1072, 1074 (1996) ("The court must look to what Customs actually did"). Taking such a look herein, this court cannot conclude that the plaintiff was so required. The complaint in *Sanyo* apparently prayed for a further, modest shift from item 685.30, the basis of the reliquidation, to the second, proposed alternative classification (item 678.50). Here, the gravamen of the controversy is an allegedly-precipitous switch by Customs from one distinct chapter of the HTSUS, 85 (Electrical Machinery and Equipment and Parts Thereof), to another, 69 (Ceramic Products). Paragraph 7 of the amended complaint avers:

Prior to March 10, 1999, blank IC substrates imported by KICC were classified under HTSUS subheading 8542.90, as parts of integrated circuits, based on HQ 088157 (July 2, 1992), i.e., the "Diacon Ruling," which classified ceramic pieces used as bases for integrated circuits under HTSUS 8542.90, a duty-free classification. The classification determination made in the Diacon Ruling was followed by KICC and Customs until Customs issued NY D88010 (March 10, 1999), which classified blank IC substrates of porcelain under HTSUS 6914.10.8000 as "Other ceramic articles: Of porcelain or china: . . . Other," dutiable at 9% *ad valorem*.⁵

The first two, numbered protests covered by this pleading encompass entries prior to that day in 1999. Moreover, the plaintiff has produced a copy of the following declaration to the Customs Service sworn to soon thereafter by KICC's erstwhile import/export specialist:

2. In 1992, I became aware of a new ruling, HQ 088157 (July 2, 1992) (i.e., the "Diacon Ruling"), which affected the tariff classification of blank ceramic substrates imported by KICC.

⁵ The court reads defendant's answer to this averment as a denial, but there is, as yet, no substantiation thereof developed on the record.

The Diacon Ruling held that "ceramic pieces" used as mounting bases for electronic integrated circuits were properly classified under subheading 8542.90 of the . . . HTSUS[] as parts of integrated circuits.

3. Upon learning of the Diacon Ruling, I transmitted a copy . . . to all of KICC's customs brokers in the ports then being used by KICC to import ceramic substrates. I instructed the brokers to classify all of KICC's ceramic substrates for integrated circuits in accordance with the Diacon Ruling.

4. At the same time I advised KICC's customs brokers to attach a copy of the Diacon Ruling to each ceramic substrates entry packet submitted to USCS.

5. When KICC underwent a National Customs Survey Audit by the USCS in 1993-95, the auditors reviewed the tariff classification of KICC's imports, including the tariff classification of blank ceramic substrates. The auditors did not object to any of KICC's classifications.

6. On several occasions during my tenure with KICC, I discussed with employees of USCS the implications of the Diacon Ruling for the tariff classification of ceramic substrates imported by KICC. During these conversations, the USCS employees never objected to the classification of ceramic substrates in accordance with the Diacon Ruling.⁶

Given this background of entry of KICC merchandise under HTSUS subheading 8542.90, it is understandable that the primary thrust of its protest of the Bureau's shift to subheading 6914.10.80 was reversion to the antecedent classification. Of course, it is also understandable that, as an alternative prong and within the realm of HTSUS chapter 69, that protest would propose more correct classification. But the grant by Customs of that proposed alternative did not affirmatively satisfy the *Sanyo* test of whether the KICC protest "has been completely granted." 81 Cust.Ct. at 115. To repeat,

[t]he only logically consistent way to determine whether a protest has been denied in part is to see whether any part of the protested decision remains in effect.

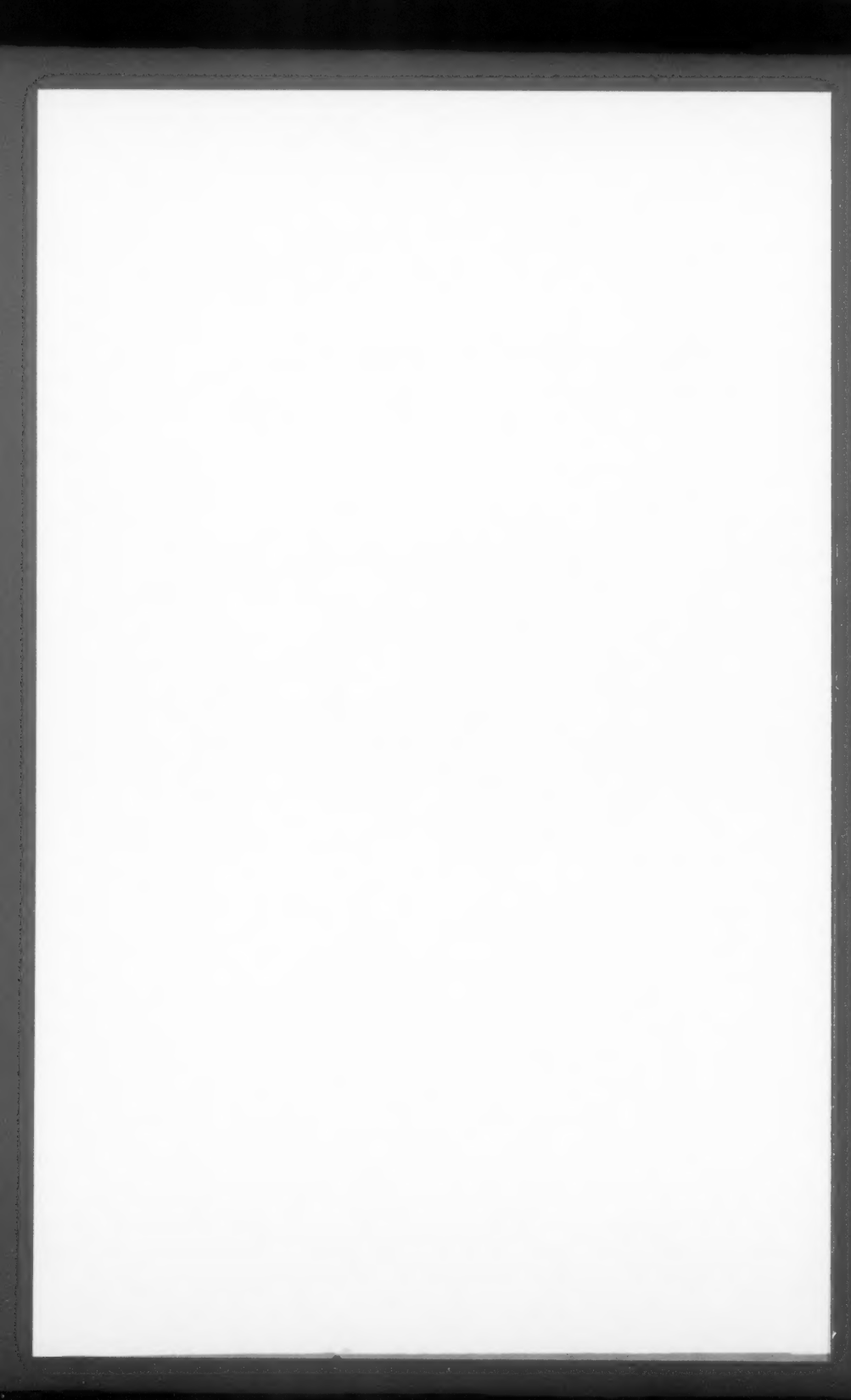
Id. Here, half of the duties of the protested decision remain in effect (under HTSUS chapter 69) in lieu of chapter 85, "a classification necessarily rejected by Customs when it granted Kyocera's alternative classification claims." Defendant's Reply to Plaintiff's Opposition to Defendant's Motion to Dismiss, p. 4. *See also id.* at 5. Ergo, this ac-

⁶Plaintiff's Opposition to Defendant's Motion to Dismiss, Exhibit C. The acronym "USCS" refers to the Customs Service.

tion contests the denial of a protest in part within the meaning of 28 U.S.C. §§ 1581(a), 2631(a), *supra*. Cf. *Atari Caribe, Inc. v. United States*, 16 CIT 588, 591-92, 799 F.Supp. 99, 104 (1992).

II

In view of the foregoing, defendant's motion for summary judgment, dismissing this action for lack of subject-matter jurisdiction, must be, and it hereby is, denied.



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